The Walt Disney Company

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Rm. TWB204
Washington, D.C. 20554

Re: In The Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming

Dear Ms. Salas:

We are transmitting herewith for filing with the Commission an original and four copies of Comments of The Walt Disney Company in CS Docket No. 99-230.

If there are any questions in connection with the foregoing, please contact the undersigned.

Respectfully submitted,

Diane H. Davidson

Diane H. Davidson
Director, Government Relations

DHD/smk

cc: Deborah Lathen
Chief, Cable Services Bureau

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Annual Assessment of the Status of Competition in Markets for the Delivery of video Programming	)	CS Docket No. 99-230
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To: The Commission

Reply Comments of the Walt Disney Company, Inc. ("TWDC")

The Walt Disney Company, on behalf of itself and its subsidiary ABC, Inc., and various multichannel video programming services which it owns and in which it has a majority ownership interest[1] (collectively, "TWDC"), hereby responds to certain arguments raised by comments filed in the above-captioned proceeding (referred to herein as "1999 Competition Report"). Specifically, TWDC's Reply comments will respond briefly to (1) commenters engaging in their yearly petition for unjustified and unnecessary changes in the Commission's program access rules; and (2) commenters urging the Commission to recommend that Congress enact legislation containing

[1] Such services include Disney Channel, Toon Disney, ESPN, ESPN2, ESPNEWS, and ESPN Classic.

provisions that would subject local broadcast retransmission consent agreements to unwarranted government intrusion and supervision.

I. Program Access Issues

A. There is No Need or Justification for Expansion of the Scope of the Program Access Rules

Several commenters in this proceeding have raised program access arguments that the Commission has previously considered and appropriately rejected. For example, some commenters again call for the unwarranted extension of the program access rules to non-vertically integrated programmers. As in past years, the handful of parties who support such expanded regulation have, in reality, asked the Commission to potentially involve itself in every programmer-distributor relationship that exists or will exist in the multichannel distribution industry. And, as viable competition to traditional cable distribution continues to mount year after year (provided in no small part by these parties as they themselves describe in their comments), the discontinuity between this position and marketplace realities becomes more glaring.

The Commission has to date appropriately declined to undertake or endorse a heightened interventionist role in the video programming marketplace. For the reasons set forth below, TWDC encourages the Commission to continue to exercise such restraint and allow this marketplace to function without the distorting impact of added and unwarranted economic regulation.

1. Government Intervention in the Form of Economic Regulation of the Marketplace is a Remedy of Last Resort

Economic regulation can potentially distort an otherwise functioning marketplace and should be employed by government only sparingly and when necessary to correct an imbalance of

market power that cannot otherwise be addressed by the marketplace itself. In recognition of this fact, when crafting the program access provisions of the 1992 Cable Act Congress imposed strict and absolute limits on the Commission's authority. One of the most fundamental of those many limits is the applicability of the program access rules to vertically integrated programmers alone. However, the several commenters noted herein would simply discard these carefully crafted limits and force the video programming marketplace into a wholly regulated status.

As the Commission and Congress have both recognized, vertically-integrated programmers may have market power incentives to disadvantage distributors with whom they are not vertically integrated, and so Congress imposed the program access rules on those programmers only to address this particular form of marketplace imbalance. And, it must be noted, in doing so Congress had the benefit of a lengthy and highly developed legislative record.[2] In marked contrast, commenters in this year's proceeding again ask the Commission to endorse a dramatic revamping of these rules based upon little more than conjecture, summary conclusions and absolutely no supporting record.[3] Further, the record clearly demonstrates that any further government intervention in the form of economic regulation is completely unwarranted.

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[2] Similarly, the Commission, in crafting its program access regulations in 1993 was able to rely on that legislative record as well as its own administrative record.

[3] For example, Optel, Inc. ("Optel"), a SMATV distributor, characterizes Congress' reasoned decision not apply the program access rules to non-vertically integrated programmers as a mere "loophole" in the 1992 Cable Act. Comments of Optel, p. 10. However, as has been pointed out many times in the past, the program access provisions of the 1992 Cable Act, whatever their wisdom, were carefully constructed to reach only certain activities and specific kinds of actors. The decision to apply them only to vertically integrated programmers was not an unforeseen "loophole."

2. Marketplace Realities Dictate That Non-Vertically Integrated Programmers Have Neither the Incentive Nor the Ability to Discriminate Against Alternative Distributors of Their Programming

Because TWDC's cable programming services, like other non-vertically integrated networks, depend upon and actively seek widespread distribution and audience share as their lifeblood, there is no incentive to disadvantage any distribution outlet. In fact, each of these services devotes substantial resources to serving alternative technology distributors such as MMDS, SMATV, TVRO and DBS. It would be a short-sighted business strategy for any similarly situated programmer not to actively market its services to all viable distribution means.

Despite this reality, various commenters continue to posit the theory that increased consolidation among cable MSOs will inevitably lead to discriminatory practices by *non*-vertically integrated programmers against distributors competing with traditional cable.[4] In effect, these commenters contend that monopsonistic cable operators will use their market power to force non-vertically integrated program providers to discriminate against the cable operator's competitors. But there are three flaws with that argument. First, even if such cable operators did attempt to pressure non-vertically integrated programmers, such program providers would have every incentive to promote competitive distribution platforms rather than disadvantage them, in an effort to reduce the market power of the "monopsonistic" cable operator and restore balance in the marketplace overall.

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[4] *See* Comments of EchoStar Satellite Corporation ("EchoStar") at pp. 6 -- 7 ("Based on their overwhelming buying power in the programming market, cable operators command discriminatory treatment at the expense of competing distributors from independent programmers as well."); Comments of Ameritech New Media, Inc. ("Ameritech") at p. 16 (Commission's flexibility to address anti-competitive practices extends to unaffiliated programmers, particularly where evidence exists that such misconduct is the product of cable operators using their market power to extract concessions); Comments of The Wireless Communications Association International, Inc. ("WCAI") at p. 7 (true source of program access problem is absence of competition at local distribution level); Comments of BellSouth Corporation and its subsidiaries ("BellSouth") at p. 12 (rapid consolidation of the cable industry will only further aggravate competitive imbalance).

Second, this theory rests solely on conjecture. As in years past, this proceeding's monopsony theme rests on predictions about the potential impact of several high profile transactions occurring in the cable industry that have not yet occurred. At this juncture it is impossible to predict with any certainty the results of these transactions, either as to their successful completion or their ultimate impact on the video programming marketplace. Because of this uncertainty, it would be extremely premature to engage in unprecedented regulatory activity in this area.

Third, the commenters' proposed solution to the asserted "abuse" of monopsony power by cable MSO's is entirely misplaced. In effect, the competitors to incumbent cable operators propose that the government impose extensive regulatory burdens on the product of the *victim* of presumed monopsony power in order to right the alleged market failure. But surely, regulating the victim as a means of curing an asserted market failure makes no rational sense.

3. No Support Has Been Provided to Justify Additional Government Intervention in This Functioning Marketplace.

As in past years, comments that support the extension of program access regulation to non-vertically integrated programmers are long on conclusory statements and hyperbole and devoid of any compelling evidence that would support the wholesale revamping of the program access rules. Moreover, TWDC believes this very large step would require Congress to overturn its own findings, and the Commission to ignore an already extensive legislative and administrative record that examined the extent and impact of vertical integration in this marketplace. There is an enormous disparity between the large leap of faith these commenters have asked the Commission to undertake and the support they have offered for such a step.

Because there has been absolutely no showing in this or past years' proceedings that non-vertically programmers discriminate against or even have an economic incentive to discriminate against any multichannel video programming distributors, the Commission should not recommend to Congress nor endorse the idea that the program access rules be extended to non-vertically integrated programmers. In 1992, Congress opened the door slightly to economic regulation of the programming marketplace (and only in reliance on a lengthy and well-developed legislative record) when enacting the program access provisions of the 1992 Cable Act. TWDC respectfully submits that the Commission should again resist calls to intervene in what appears to be a functioning and vibrant marketplace.

B. There is No Need or Justification for Government Intrusion in Customary Program Packaging Decisions

The comments of Hiawatha Broadband Communications, Inc. ("HBC"), a cable overbuilder in Minnesota, submit that the Commission in its Notice of Inquiry expressed "a preference for additional customer choice in the form of 'a la carte' programming options[.]"[5] TWDC questions this characterization of the Commission's inquiries, and notes that no citation to the NOI or any other source is provided to identify any such affirmative conclusion by the Commission. Moreover, TWDC disagrees with HBC's characterization of pricing and packaging requirements common in the video distribution industry as "abusive."[6] There is ample evidence demonstrating that such requirements serve to keep prices down for individual programming services, enable customers to purchase a wide variety of popular programming at affordable prices, and allow newly-launched programming services to reach the larger audiences critical to achieve consumer awareness and

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5 Comments of Hiawatha Broadband Communications, Inc. at p. 10.

6 *Id.*

popularity. Rather than take up more of the Commission's time, however, we would refer the Commission to a report filed in last year's Video Competition proceeding by TWDC entitled "*How Bundling Cable Networks Benefits Consumers*," prepared by Economists Incorporated, that addresses these issues in detail.

II. Broadcast Station Retransmission Consent Agreements

Certain commenters are proposing an expansion of government regulation of the programming marketplace in another respect. In addition to repeating their annual request to broaden the scope of the program access rules to include non-vertically integrated program producers, these commenters now also seek expanded government regulation of broadcast retransmission consent agreements.[7] The FCC already prohibits agreements that would grant exclusive rights to cable operators for retransmission of broadcast signals.[8] Now these commenters want the Commission to advise Congress that it believes that the FCC should also regulate the prices, terms and conditions of broadcast retransmission consent agreements. TWDC believes that the Commission should refrain from making any such recommendation to Congress for the reasons discussed below.

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7 *See* BellSouth Comments at 18, WCAI Comments at 11, EchoStar Comments at 10, Satellite Broadcasting & Communications Association at 18.

8 *See* 47 C.F.R. § 76.64(m).

A. Government Intervention in the Form of Economic Regulation of the Marketplace is a Remedy of Last Resort

As argued earlier in these Reply Comments, economic regulation can potentially distort an otherwise functioning marketplace, and thus should be used by the government only as a last resort for correction of market failure.[9] There is no reason to believe that the market will not function in this instance. The Commission is well aware that TWDC, along with all other broadcasters, has long supported enactment of legislation that would amend the copyright laws to permit direct broadcast satellite operators to retransmit local broadcast signals into their local markets. Indeed, TWDC believes that such legislation is the only effective way to address the problem of illegal satellite distribution of distant broadcast signals to ineligible subscribers that has plagued broadcasters for a number of years.

In order for satellite providers to retransmit local signals, however, they must obtain retransmission consent from the local broadcaster. The local broadcaster has every incentive to grant such consent and absolutely no reason to refuse to negotiate fair and reasonable terms because the local broadcaster wants – and needs -- the broadest possible distribution of its local signal. In addition, carriage of the local station will minimize, if not stop, importation of competing distant network signals into the broadcaster's market that erode the local station's market share and threaten its economic viability. There is no reason to anticipate that local broadcasters will not act in their own economic best interests and enter into fair and reasonable retransmission consent agreements with satellite operators.

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[9] *See* p.3, supra.

B. Economic Regulation of Broadcast Retransmission Consent Agreements Is Not Necessary or Justifiable

The four largest broadcast networks have committed to Congress their intention to negotiate fair and reasonable retransmission consent agreements – indeed, Fox and EchoStar have *already* reached agreement with respect to retransmission of Fox's owned and operated station group.[10] Government intervention is unnecessary because the marketplace is already working and will continue to work on its own.

Commenters urging that the Commission should be involved in the oversight of retransmission consent agreements again attempt to justify their request by pointing to consolidation in the cable industry. Again, the arguments advanced earlier in these Reply Comments refute these conjectures as well.[11]

Finally, TWDC submits that true parity between cable and alternate technology providers in the retransmission consent arena requires only that which already exists: the ability to negotiate with broadcast television stations for retransmission consent rights. But these commenters seek, in effect, a predetermined outcome to their negotiations. They have essentially demanded that they be given broadcast retransmission consent rights on "the same" terms and conditions as cable operators. However, a mere difference in terms and conditions of carriage does not, by itself, establish any anti-competitive behavior. As the Commission no doubt appreciates, different parties bring different elements to the negotiating process; absent any showing whatsoever of market failure

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10 *See* Letter from Bob Iger (Chairman, ABC Group), Chase Carey (Chairman & CEO, Fox Television), Mel Karmazin (President & CEO, CBS Corporation), and Bob Wright (President & CEO, NBC), dated June 28, 1999, to the Honorable Orrin Hatch, Chairman of the Senate Committee on the Judiciary. A copy of this letter is included in these Reply Comments as "Attachment A."

11 *See* pp. 4-6, supra.

caused by anti-competitive behavior, it is not the place of government to dictate the outcome of that process.

Over the past six years members of the cable industry and the broadcast television industry have crafted countless retransmission consent arrangements that reflect the needs of the individual parties involved. Alternate technology providers should be provided every opportunity to do so as well, but no more.

Conclusion

There is no need or justification for expansion of the scope of the program access rules. There is no need or justification for government intrusion in customary program packaging decisions. And there is no need or justification for economic regulation of broadcast retransmission consent agreements. The record reflects a healthy and vibrant marketplace that is sustaining and nurturing the continued growth of competition by distribution technologies offering an alternative to incumbent cable service. TWDC encourages the Commission to recommend that Congress continue to allow the marketplace to function without the distorting impact of any added and unwarranted economic regulation.

Respectfully submitted,

By: Diane H Davidson

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Diane Hofbauer Davidson
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The Walt Disney Company
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ATTACHMENT A




June 28, 1999

The Honorable Orrin Hatch
Chairman
Senate Committee on the Judiciary
SR-131 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We have long advocated a change in the copyright law to permit direct broadcast satellite operators to retransmit local broadcast stations back into local markets, and we strongly endorse the provisions in both the House and Senate bills that authorize satellite local into local service. We firmly believe that the ultimate solution to the problem of satellite carriers illegally providing distant network signals to ineligible subscribers is granting satellites the authority to deliver consumers their local network affiliate. Such a solution will enable satellites to compete effectively with cable systems while protecting the rights obtained by local broadcasters to air programming within their distinct markets.

To meet these goals, which we endorse, satellite providers must obtain the consent of local broadcasters to retransmit their signals. **In that regard, we have every incentive to negotiate fair and reasonable local retransmission consent agreements with EchoStar, DirecTV and any other satellite carrier that plan to offer local into local service once Congress approves legislation authorizing such service.** Our purpose is to enter into and conclude these negotiations in a timely manner. Fox and EchoStar have already reached a retransmission consent agreement for Fox's owned and operated station group. Broadcasters have an economic incentive to negotiate retransmission consent agreements with satellite carriers as a means of minimizing the distribution of distant signals, while maximizing the delivery of their signal within their local market.

However, we also strongly believe that these retransmission consent negotiations should be dictated by market-based considerations, free from government interference. Both sides have strong incentives to negotiate retransmission consent deals, and the marketplace, not the Federal Communications Commission, should determine the value of those agreements. Furthermore, federal regulations already prohibit exclusive retransmission consent agreements between a broadcaster and any multichannel video provider. We believe it is inappropriate for the government to inject itself into the private negotiations between two parties especially when no compelling evidence exists that either party has, or is likely to refuse to negotiate.

We look forward to the passage of legislation authorizing satellite local into local service and building a new partnership with competitive distribution platforms that will enhance the delivery of our stations within their local markets.

Sincerely,

Bob Iger
Chairman, ABC Group

Mel Karmazin
President and CEO, CBS Corporation

Chase Carey
Chairman and CEO, Fox Television

Bob Wright
President and CEO, NBC